Supreme Court, U.S.
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No. —

IN THE

Supreme Court of the United States

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, and UNITED STEELWORKERS OF AMERICA, LOCAL 14398,
Petitioners,

v.

APPALACHIAN REGIONAL HEALTHCARE, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Should the decision of the court of appeals below be vacated and remanded for reconsideration in light of this Court's *per curiam* decision in *Major League Baseball Players Association v. Garvey*, 532 U.S. __, 69 U.S.L.W. 3725 (No. 00-1210, decided May 14, 2001) which was decided four days after the denial of the rehearing petition in this case?

II. May a Federal Court declare that collective bargaining agreements inherently contain the reserved rights theory of management prerogatives and then vacate an arbitrator's award, which found that a labor agreement was silent on part-time employees being required to work over their scheduled time, as contrary to the reserved management right to require part-time employees to work overtime?

III. Should the outside limit for vacating a labor arbitration award be the standards set forth in Section 10(a) of the Arbitration Act?

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT	3
REASONS FOR GRANTING THE PETITION	7
I. THE DECISION BY THE COURT OF APPEALS BELOW CONFLICTS SQUARELY WITH DECISIONS OF THE FIFTH, SEVENTH, NINTH AND TENTH CIRCUITS	9
II. THE PETITION PRESENTS IMPORTANT QUESTION OF FEDERAL ARBITRATION LAW	13
CONCLUSION	17

TABLE OF AUTHORITIES

CASES Page

Appalachian Regional Healthcare, Inc. v. United Steelworkers of America, 245 F.3d 601 (6th Cir. 2001) 1
Circuit City Stores Inc. v. Adams, __ U.S. __, 69 U.S.L.W. 4195 (No. 99-1379, decided March 21, 2001) 8, 16
Dreis & Krump Mfg. v. Machinists, 802 F.2d 247 (7th Cir. 1986) 11
Edward Hines Lumber Co. v. Lumber & Sawmill Workers, 764 F.2d 631 (9th Cir. 1985), *cert. denied*, 475 U.S. 1131 (1986) 12
Federated Dept. Stores v. J.V.B. Industries, 894 F.2d 862 (6th Cir. 1990) 16
Folger Coffee v. Auto Workers, Local 1805, 905 F.2d 108 (5th Cir. 1990) 11
Major League Baseball Players Association v. Garvey, 532 U.S. __, 69 U.S.L.W. 3725 (No. 00-1210, decided May 14, 2001) (per curiam) ..8, 16, 17
Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985) 14
Moses H. Cone Memorial Hospital v. Mercury Const., 460 U.S. 1 (1983) 13
National Gypsum Co. v. Chemical Workers, 147 F.3d 399 (5th Cir. 1998) 9
NCR Corp., E&M-Wichita v. District Lodge 70, Machinists, 906 F.2d 1499 (10th Cir. 1980)..... 12
Southland Corp. v. Keating, 465 U.S. 1 (1984)..... 14
Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957)..... 13, 16
United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960)..... 10, 14
United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960)..... 7, 13, 14, 15

TABLE OF AUTHORITIES

OTHER AUTHORITIES — Page

S. Hayford, Unification of the Law of Labor Arbitration and Commercial Arbitration: An Idea Whose Time Has Come, 52 Baylor L. Rev. 781 (2000) 15

C. Killingsworth, "The Presidential Address: Management Rights Revisited", Proceedings of the 22nd Annual Meeting of the National Academy of Arbitrators 1 (BNA, 1970) 15

STATUTES

9 U.S.C. § 10(a) 2

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 2

29 U.S.C. § 185(a) 2

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PETITION FOR A WRIT OF CERTIORARI

The United Steelworkers of America, AFL-CIO·CLC and its Local 14398 respectfully petition this Court for issuance of a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Sixth Circuit in *Appalachian Regional Healthcare, Inc. v. United Steelworkers of America, AFL-CIO-CLC, Local 14398, and United Steelworkers of America*, No. 99-6590 (2001).

OPINIONS BELOW

The opinion of the divided court of appeals below, with Judge Gilman dissenting, is reported at 245 F.3d 601 and is reproduced as Appendix A. App. 1a. The order of the court

of appeals below denying the petition for rehearing and suggestion for rehearing *en banc* is reproduced as Appendix D. App. 25a. The opinion of the district court is unreported and is reproduced as Appendix B. App. 15a. The opinion and award issued by Arbitrator W. Scott Thomson is unreported and is reproduced as Appendix C. App. 18a.

JURISDICTION

The court of appeals below entered its Judgment on March 29, 2001. A timely Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied on May 10, 2001. App. 25a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The district court below had jurisdiction over this case under Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a) ("Section 301"). The court of appeals below had jurisdiction of this case pursuant to 28 U.S.C. § 1291.

STATUTORY PROVISIONS INVOLVED

Section 301 provides, in relevant part:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter . . . may be brought in any district court of the United States having jurisdiction of the parties, without regard to the amount in controversy or without regard to the citizenship of the parties."

Section 10(a) of the Arbitration Act, 9 U.S.C. §10(a), provides, in relevant part, as follows:

> "(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
>
> (1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

. . . ."

STATEMENT

Respondent Appalachian Regional Healthcare, Inc. ("Company") and petitioner United Steelworkers of America ("Union") were parties to a collective bargaining agreement ("1995 CBA"). App. 26a. [1] The 1995 CBA requires disputes between the parties to be settled in accordance with the grievance and arbitration procedure. App. 28a. The 1995 CBA also contains a broad no strike clause: App. 28a.

In the 1995 CBA, the Company recognized the Union as the representative of both "the full time and regularly employed part-time" employees. App. 26a. The 1995 CBA sets forth the difference between these employees. Article XV states that the "basic work week [for all employees under this Article] shall be forty (40) hours per week . . .", while Article XLVII, "PART TIME EMPLOYEES", specifies that "[t]he term 'regularly employed part-time Employee' refers to persons who regularly work a number of hours and days a week which are less than the customary full forty (40) hour

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[1] The relevant provisions of the 1995 CBA are reproduced in Appendix E.

work week." App. 26a, 29a. Article XLVII also states that regularly employed part-time employees "shall customarily work on a regular part-time scheduled basis . . ." and "shall enjoy proportionate holiday, vacation and sick leave benefits . . . ." App. 29a.

A dispute arose between the Company and the Union when the Company discharged three part-time laundry room employees for refusing on January 2, 1998, to obey an order to work beyond their regular part-time schedule of 4:30 p.m. to 8:30 p.m. App. 21a. This was the second time in less than a week that they had refused to work over. App. 20a-21a.

The Company and the Union selected Arbitrator W. Scott Thomson to hear the matter concerning the discharge. App. 19a. Arbitrator Thomson held a hearing on October 13, 1998, and both parties submitted testimony, argument and post-hearing briefs. App. 19a. The issue submitted for decision was "[w]hether the Employer had just cause to discharge Grievants . . . ." App. 20a. On December 11, 1998, Arbitrator Thomson issued an Opinion and Award granting the grievance and directing that the employees be reinstated but with back pay only for the period January 3 to March 2, 1998. App. 24a.

Arbitrator Thomson began by holding that the 1995 CBA "provides for two types [of] employees, (1) regular full time employees, and (2) regular part-time employees." App. 22a. He reached that conclusion after noting that Article XV provided for a regular work day of 8 hours and a regular work week of 40 hours. App. 22a. He contrasted that with the fact that Article XLVII defined a regular part-time employee in terms of "persons who regularly work a number of hours and days a week which are less than the customary full forty (40) hour workweek." App. 22a. He also noted that the 1995 CBA specified that regular part-time employees "shall work [on] a regular part-time scheduled basis. . . ." App. 22a.

Arbitrator Thomson concluded that part-time employees were outside the scope of the contractual overtime provisions because "Article XV, Section B, only mandates 'overtime' work when employees are requested to work in excess of eight hours per day." App. 23a. He noted that "[t]here is no provision permitting the Employer to require an employee to work more than their regular scheduled part-time hours." App. 23a. This was significant, because while "Article XLII only permits the Employer to direct the working force and of establishing reasonable policies in connection therewith . . .", the Arbitrator noted that Article XLII also states that "[t]hese prerogatives shall not abridge any term, provision, or condition of this Contract." App. 23a. Article XLVII specifies that part-time employees "shall work [on] a regular part-time scheduled basis . . . ." App. 22a.

The fact that the 1995 CBA did not give the Company the right to order the part-time employees to work overtime did not end the inquiry. The Arbitrator found that the part-time employees had failed to "adhere to the age old policy of 'continuing work and then grieve.'" App. 23a. He also noted that the Company had offered them the opportunity to return to work on March 2 and again on April 1, 1998. App. 24a. The part-time employees refused to do so, and the Arbitrator held that they were "not entitled to compensation except for the period commencing January 3, 1998, until March 2, 1998." App. 24a.

The Company sued to vacate the Award, and the Union counterclaimed for enforcement. Acting on cross-motions for summary judgment, the district court below declared that the 1995 CBA "clearly establishes Appalachian's right to require employees to work overtime." App. 16a. The district court below concluded that "[t]he arbitrator's decision to reinstate the discharged employees, after Appalachian exercised its rights under the agreement, must be reversed." App. 16a-17a.

The Union appealed, and the court of appeals below affirmed the district court's decision. After stating the principle that "[r]eview of an arbitrator's award is necessarily limited . . .", the court of appeals below turned to its four factor test for vacating arbitration awards, as follows:

> "(1) an award conflicts with express terms of the collective bargaining agreement . . . ;
>
> (2) an award imposes additional requirements that are not expressly provided in the agreement . . . ;
>
> (3) an award is without rational support or cannot be rationally derived from the terms of the agreement . . . ; and
>
> (4) an award is based on general considerations of fairness and equity instead of the precise terms of the agreement . . . . *See Cement Divs., Nat. Gypsum Co. v. United Steelworkers of America, et al.*, 793 F.2d 759, 766 (6th Cir. 1986)." (App. 6a) (citations omitted)

The court of appeals below held that Arbitrator Thomson's decision ran afoul of the first and second factors. App. 6a. Interpreting for itself the contractual overtime provisions as applying to part-time employees, the court of appeals below found a first factor violation, holding that "[t]he arbitrator was therefore wrong to conclude that there was no provision permitting ARH to direct its part-time workers to work overtime. . . ." App. 7a. (footnote omitted). Apparently in response to the dissent's view that the overtime provision was ambiguous, the court of appeals below also found a second factor violation, as follows:

> "Nevertheless, even if we were to credit the arbitrator's construction of the Agreement as against its conflict with express provisions, we would still have to vacate the award as it imports notions not found in the Agreement itself." App. 8a.

These improper "notions", the court of appeals below explained, were Arbitrator Thomson's assignment of controlling significance to the absence of a contractual provision that permitted the Company to require overtime work by regular part-time employees and to the absence of a contractual provision that permitted the Company to require an employee to work more than his or her regularly scheduled part-time hours. App. 8a. The court of appeals below held that Arbitrator Thomson's notions contradicted the management rights principles that "[t]he Agreement need not include provisions permitting management action on every conceivable employment matter; rather, on issues not discussed in the Agreement, management retains discretion." App. 8a. As support for its holding, the court of appeals below cited this Court's decision in *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). App. 8a. The court of appeals below vacated the Award because "[t]he arbitrator created a limitation on ARH's management rights that is not found in the Agreement . . . ." App. 9a (footnote omitted).

Judge Gilman dissented on the grounds that the majority "impermissibly replaces the arbitrator's construction of the Agreement", the contractual overtime, part-time employees and management rights clauses, "with its own interpretation." App. 13a. Moreover, Judge Gilman noted that the arbitrator's reinstatement remedy was explicitly authorized by Article XXXII which specifies that " 'the arbitrator shall have the authority to modify the penalty . . .' " App. 12a. Judge Gilman stated that he would reverse the decision of the district court below and reinstate the Arbitrator's Award. App. 14a.

REASONS FOR GRANTING THE PETITION

First, the court of appeals below decided this case without the benefit of the guidance provided by this Court's summary reversal of the Ninth Circuit's decision vacating an arbitra-

tion award in *Major League Baseball Players Association v. Garvey*, 532 U.S. ___ 69 U.S.L.W. 3725, 3726 (No. 00-1210, decided May 14, 2001) (per curiam) where this Court held:

> "Even when the arbitrator's award may properly be vacated, the appropriate remedy is to remand the case for further arbitration proceedings."

Vacating the Sixth Circuit's decision and remanding it for further consideration in light of *Garvey* may very well render unnecessary this Court's resolution of the reserved management rights issue. Moreover, even if Arbitrator Thomson was wrong in holding that the Company did not have the contractual right to order the part-time employees to work past their scheduled time, Arbitrator Thomson would still need to determine whether the discharge was for just cause, including whether the penalty fit the crime.

Second, the circuit courts are now split on the issue of whether the principle of reserved management rights is, as a matter of law, part of every collective bargaining agreement. Labor arbitrators have always differed on what weight, if any, to give to the principle of reserved management rights in interpreting labor agreements, but the arbitrators' differing views have heretofore been deferred to by the circuit courts as permissible contract interpretation. Imposing, judicially as a matter of law, the reserved management rights principle upon labor agreements usurps the arbitrator's contract interpretation function and threatens to undo the peaceful resolution of labor disputes through voluntary arbitration which Congress has established and this Court has fostered.

Third, this Court's recent decision in *Circuit City Stores Inc. v. Adams*, __ U.S. __, 69 U.S.L.W. 4195 (No. 99-1379, decided March 21, 2001) raises the question of whether this Court should harmonize Section 301 and Section 10(a) of the Arbitration Act by holding that the outside limit of a court's authority to vacate a labor arbitration award is set by the specific grounds listed in Section 10(a) of the Arbitration Act.

Section 10(a) lists only claims of serious misconduct by the parties or by the arbitrator, claims of a lack of procedural fairness which prejudice the rights of a party, and a claim of a lack of authority in the arbitrator and does not permit judicial review of the substantive merits of an arbitration award.

I. THE DECISION BY THE COURT OF APPEALS BELOW CONFLICTS SQUARELY WITH DECISIONS OF THE FIFTH, SEVENTH, NINTH AND TENTH CIRCUITS

The court of appeals below held that the Company possessed inherent or reserved management rights—"on issues not discussed in the Agreement, management retains discretion." App. 8a. Thus, under the view of the court of appeals below, when Arbitrator Thomson found that there was no contract provision permitting the Company to require an employee to work more than his or her regularly scheduled part-time hours, the Arbitrator was constrained to hold that the right to require such over-scheduled-time work was inherently reserved to the Company. Therefore, when Arbitrator Thomson relied on that contractual silence and the separate contractual article governing part-time employees to hold that the Company lacked the contractual authority to require the part-time employees to work over their regularly scheduled hours, the court of appeals below vacated the Award. App. 10a.

A management's rights argument quite similar to that adopted by the court of appeals below was rejected by the Fifth Circuit in enforcing an arbitration award in *National Gypsum Co. v. Chemical Workers*, 147 F.3d 399 (1998). In *National Gypsum*, the employer put into effect a schedule change "under which no employee would work more than six days in any week." 147 F.3d at 401. The schedule change resulted in substantial pay cuts because the employees had been working a seven-consecutive day schedule, earning time and a half on Saturday and double time on Sunday. 147 F.3d

at 401. The arbitrator held that the employer's unilateral change in scheduling violated its duty to bargain with the union which was derived from § 5, the contractual recognition clause. The employer argued that the arbitrator's award violated § 104, the management's rights clause, which reserved to management "'the right to . . . schedule and reschedule employees as required by the business needs and operations requirements . . . .'" 147 F.3d at 404. The arbitrator had "concluded that, although the provision gives management scheduling rights, it does not allow management to exercise those rights 'as a vehicle for the wholesale reduction of the wage bargain.'" 147 F.3d at 404. The arbitrator there, as Arbitrator Thomson did here, pointed to the fact that the labor agreement limited the scope of the management's rights clause by stating that it "may be 'expressly limited by the written terms of [the] Agreement.'" 147 F.3d at 405. The Fifth Circuit upheld the award, noting that the tension created between the wage provisions and the management's scheduling rights was a matter of contract interpretation for the arbitrator to resolve:

> "Without question, there is some tension between the arbitrator's construction of § 5 and the management rights clause. To the extent that § 5 and § 104 are in conflict, however, the arbitrator had the authority to resolve this conflict in favor of the Union. The arbitrator did not ignore § 104, but attempted to harmonize that provision with the bargaining requirement he found in § 5. The Company and the Union bargained for the arbitrator's interpretation of the Agreement, not ours. *See Enterprise Wheel*, 363 U.S. at 597, 80 S.Ct. at 1361. Because we cannot say that the arbitrator's decision did not 'concern[] the construction of the contract . . . ,' we must enforce it. *Id.* at 599, 80 S.Ct. at 1362." 147 F.3d at 405.

The Fifth Circuit also rejected an employer's management rights challenge to an arbitration panel's award that the

contracting out of yard work violated the labor agreement. *Folger Coffee v. Auto Workers, Local 1805*, 905 F.2d 108 (5th Cir. 1990). The only reference to contracting out was in the management rights clause which reserved to the employer all rights "*except those that are specifically given up or modified by the express written terms of the Agreement . . .*" and which stated that "[i]ncluded in the rights reserved to the Company . . . are . . . the *determination of the nature and extent of work*, if any, to be *contracted or transferred out* . . . ." 905 F.2d at 109n.3 (emphasis in the original). The arbitration panel reasoned that Folger's right to contract out was "not absolute" and that, because Folger's employees had necessary skills and tools to perform the work as they had in the past, Folger violated the seniority and recognition provisions of the labor agreement. 905 F.2d at 109. The Fifth Circuit enforced the award noting that "the arbitration panel in the instant case did not ignore the subcontracting provision . . . . They quoted it and commented upon its meaning." 905 F.2d 111-112.

Similarly, the Seventh Circuit enforced an arbitrator's subcontracting violation award in the face of a broad management rights clause in *Dreis & Krump Mfg. v. Machinists*, 802 F.2d 247 (7th Cir. 1986). The Seventh Circuit quoted the arbitrator's opinion rejecting "the company's argument that the management-rights provision 'negates any implied prohibition on subcontracting' . . ." 802 F.2d at 253. After noting that employer's counsel had abandoned that position at oral argument, the Seventh Circuit observed that "the agreement contains implied as well as express terms . . . and the implied terms may require that the management-rights provision be given a narrower scope than its language might suggest." 802 F.2d at 253 (citations omitted). The Seventh Circuit concluded "that the company's attack on the award was frivolous . . . ." 802 F.2d at 254. Relying upon the Seventh Circuit's reasoning in *Dreis & Krump*, the Tenth Circuit enforced an arbitrator's

subcontracting violation award in the face of a broad management-rights clause which provided that the employer "may 'subcontract work as deemed necessary or desirable,' . . . ." *NCR Corp., E&M-Wichita v. District Lodge 70, Machinists*, 906 F.2d 1499, 1504, 1506 (10th Cir. 1980).

In a case which is strikingly similar to this case, an arbitrator's award that an employer subcontracted work in violation of the labor agreement was enforced by the Ninth Circuit. *Edward Hines Lumber Co. v. Lumber & Sawmill Workers*, 764 F.2d 631 (9th Cir. 1985), *cert. denied*, 475 U.S. 1131 (1986). There, as here, "[n]o express provision prohibiting subcontracting exists in the Agreement." 764 F.2d at 635. There, as here, the agreement contained a very broad management rights clause. In fact, the *Edward Hines* management rights clause was even broader in that it reserved all management rights not "specifically abridged" by the labor agreement. 764 F.2d at 633n.1. There, "the arbitrator considered the reserved rights theory of management, but rejected it after reviewing the applicable authorities." 764 F.2d at 635. Unlike here, the *Edward Hines* arbitrator relied on the existence of a past practice of the employer maintaining a 60-40 ratio of employer to contractor work. However, the arbitrator also placed reliance on implied contractual rights, as Arbitrator Thomson did here, when he "found that other clauses, such as wages, recognition, union security, and seniority, taken together, constituted an implied covenant that the employer would not seriously erode the bargaining unit by subcontracting." 764 F.2d at 635. The Ninth Circuit noted that the district court, which had vacated the award, "appears to have disagreed with the conclusions and interpretations of the arbitrator." 764 F.2d at 635. "Given the policy of deferral to arbitration award, and the narrow standard to be applied permitting only of limited review by the court," the Ninth Circuit reversed the district court's decision and enforced the award. 764 F.2d at 635.

II. THE PETITION PRESENTS IMPORTANT QUESTION OF FEDERAL ARBITRATION LAW

The decisions of this Court concerning both commercial arbitration and labor arbitration have emphasized that parties will be held to their arbitration bargain as a matter of congressional policy. Initially, this was accomplished with respect to labor arbitration by holding that Section 301 was the source of substantive law, to be "fashion[ed] from the policy of our national labor laws," which governs labor agreements and their arbitration provisions. *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456 (1957). Labor arbitration was then separated from commercial arbitration and the hostility which the federal courts had accorded to commercial arbitration. Finally, this Court noted that, while arbitration is a matter of contract, "to be consistent with congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration, the judicial inquiry under § 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made." *United Steelworkers v. Warrior & Gulf N. Co.*, 363 U.S. 574, 582 (1960). "Doubts should be resolved in favor of coverage . . . ." 363 U.S. at 583 (footnote omitted).

The path followed with respect to commercial arbitration has closely paralleled that of labor arbitration. In *Moses H. Cone Memorial Hospital v. Mercury Const.*, 460 U.S. 1 (1983), this Court noted that the Arbitration Act "create[s] a body of federal substantive law of arbitrability . . .", that "Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary . . .", and that "[t]he Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . ." 460

U.S. at 24-25. In *Southland Corp. v. Keating*, 465 U.S. 1 (1984), this Court held that the Arbitration Act preempts state statutes which undercut the enforceability of agreements to arbitrate. 465 U.S. at 16. Finally, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985), this Court held that statutory claims were subject to the same contractual test of arbitrability—"the parties' intentions control, but those intentions are generously construed as to issues of arbitrability." 473 U.S. at 626.

This Court has yet to consider the standard for enforcing commercial arbitration awards under Section 10(a) of the Arbitration Act. However, this Court has established a very narrow standard of judicial review of labor arbitration awards which excludes entirely judicial review of the merits of an award. In the *Steelworkers Trilogy*, this Court emphasized that "[t]he refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements . . ." and that "the courts have no business overruling [the arbitrator] because their interpretation of the contract is different from his." *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596, 599 (1960). Again, under *Warrior & Gulf*, "the judicial inquiry under § 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made." 363 U.S. at 582.

The decision of the court of appeals below threatens to unravel the very fabric of the comprehensive policy which Congress has selected and this Court has woven to hold parties to their arbitration bargain. The court of appeals below did not merely engage in impermissible contract interpretation; it went much further by defining the very nature of collective bargaining agreements as premised upon the reserved management rights theory. It declared that "[t]he Agreement need not include provisions permitting management action on every conceivable employment matter;

rather, on issues not discussed in the Agreement, management retains discretion." App. 8a. For support, it cited not to the language of the management rights clause of the 1995 CBA, but to this Court's decision in *Warrior & Gulf*. App. 8a. Thus, the court of appeals below decided a matter of law, not a contract interpretation matter.

The decision is pernicious because it strikes at the very heart of a labor arbitrator's interpretive function by removing from the arbitrator's consideration whether a labor agreement contains implied, as well as express obligations. Arbitrators differ widely on the nature of management rights; indeed, Arbitrator Charles C. Killingsworth, the outgoing President of the National Academy of Arbitrators in 1969, described these differing arbitral views as "the long-smoldering controversy about management's reserved rights versus implied obligations under a collective bargaining agreement." C. Killingsworth, "*The Presidential Address: Management Rights Revisited*", Proceedings of the 22nd Annual Meeting of the National Academy of Arbitrators 1 (BNA, 1970). An equivalent action in commercial arbitration would be for a federal court to declare that all Automobile Sales contracts, entered into which affect commerce, are premised on the principle of *caveat emptor* and then to vacate a commercial arbitration award which had held that the seller had violated an implied obligation of good faith and fair dealing. In both instances, the federal court would, by defining the nature of the agreement, be usurping the role of the arbitrator as the bargained-for interpreter of the agreement.

The time has come for this Court to harmonize the "draws its essence" test for labor arbitration awards under Section 301 with the Arbitration Act's grounds for vacating arbitration awards contained in Section 10(a). *See*, S. Hayford, *Unification of the Law of Labor Arbitration and Commercial Arbitration: An Idea Whose Time Has Come*, 52 Baylor L. Rev. 781 (2000). This Court's recent decision in

Circuit City, that the Arbitration Act applies to all contracts of employment except for workers directly employed in interstate commerce, removed the last impediment to holding the Arbitration Act applicable to collective bargaining agreements. However, because this Court held in *Lincoln Mills* that Section 301 governs collective bargaining agreements and their arbitration provisions, this Court should harmonize the two statutes. Section 10(a) permits an arbitration award to be vacated only upon a showing of serious misconduct by the other party or by the arbitrator, of a lack of procedural fairness which is prejudicial to the moving party, or of a lack of authority in the arbitrator. None of these statutory grounds permits a court to interpret the agreement concerning the merits of the dispute and would rule out the four-factor test for vacating awards applied by the court of appeals below.[2] This case presents this Court with the opportunity to harmonize Section 301 and Section 10(a) by holding that Section 10(a) sets the outside limits beyond which the federal judiciary may not go in vacating an award and permits no judicial review of the award's contractual merit whatsoever.

Finally, the decision of the court of appeals below conflicts directly with this Court's subsequent *Garvey* decision. In *Garvey*, this Court emphasized that it means it when it says "[c]ourts are not authorized to review the arbitrator's decision on the merits . . . "; this Court held that "[e]ven when the arbitrator's award may properly be vacated, the appropriate remedy is to remand the case for further arbitration proceedings." 69 U.S.L.W. at 3725. Here, remand was especially appropriate because even if Arbitrator Thomson

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[2] Standing on its head the solicitude which this Court showed for labor arbitration in the *Steelworkers Trilogy*, the court of appeals below applies to commercial arbitration awards not the expansive four-factor test applied here, but the Section 10(a) factors construed very narrowly. *Federated Dept. Stores v. J.V.B. Industries*, 894 F.2d 862 (6th Cir. 1990).

was wrong in holding that the Company lacked the contractual right to require part-time employees to work over their scheduled times, he still needed to decide whether the penalty of discharge fits the crime under the contractual just cause for discharge provision. Indeed, the 1995 CBA states explicitly that, in a discharge case, "the arbitrator shall have the authority to modify the penalty . . . ." App. __ a.

Thus, if this petition for certiorari had been pending at the time *Garvey* was decided, this Court would have summarily vacated the decision of the court of appeals below and remanded the case for reconsideration in light of *Garvey*. The fact that *Garvey* was not decided until May 14, 2001, four days *after* the court of appeals below denied the petition for rehearing, suggests the same summary treatment is appropriate here.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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Dated: August 8, 2001

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 99-6590

APPALACHIAN REGIONAL HEALTHCARE, INC.,
Plaintiff-Appellee,

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
LOCAL 14398, and UNITED STEELWORKERS OF AMERICA,
Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Kentucky at Frankfort
No. 99-00007—Joseph M. Hood, District Judge

Argued: November 3, 2000
Decided and Filed: March 29, 2001

OPINION

KRUPANSKY, Circuit Judge. Defendant-Appellants the United Steelworkers of America, AFL-CIO-CLC, Local 14398, and the United Steelworkers of America (collectively, the "Union") challenge an award of summary judgment vacating an arbitrator's award which had required the reinstatement of three discharged employees at Plaintiff-Appellee Appalachian Regional Healthcare, Inc. ("ARH").

ARH, a not-for-profit charitable corporation under the laws of Kentucky, operates several hospitals and healthcare facilities in eastern Kentucky and West Virginia, including a hospital located in South Williamson, Kentucky, where the relevant events transpired. The Union represents certain

ARH employees at the South Williamson hospital including Chris Adkins, Steven Mahon and Lamar Thomas ("Grievants"), who contend that ARH violated the Collective Bargaining Agreement ("Agreement") by discharging them.

On December 30, 1997, Grievants were to work from 4:30 P.M. to 8:30 P.M., their normal shift as part-time workers in ARH's laundry room. Shortly before 8:20 P.M., the foreman ordered[1] the Grievants to "stay on their machines" beyond 8:30 P.M. Without offering a reason as to why they would not remain, Grievants refused and left the worksite. Grievants received a Written Record of Verbal Warning the next day. They were charged with violating the Code of Ethics[2] and leaving the worksite in contravention of a direct order to remain. Grievants did not challenge this disciplinary decision. On January 2, 1998, the Grievants were again ordered to work beyond 8:30 P.M. Again they refused without offering a reason as to why they would not remain. Grievants were suspended by letter dated January 5, 1998. On January 8, 1998, they were discharged for insubordination in violation of the Code of Ethics. Pursuant to the Agreement, the dispute was submitted to an arbitrator, W. Scott Thompson, who was mutually selected by the parties.

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[1] Before the arbitrator, the Union contended that ARH's supervisors did not issue a direct order. The arbitrator found that ARH's supervisors indeed had issued direct orders and the Union does not challenge that finding here.

[2] The Code of Ethics provides in part:

> (3) *Violations of the Code of Ethics*
>
> The following acts are considered appropriate reasons for disciplinary action, however, these acts are obviously not all the reasons the Corporation may deem cause for disciplinary action.
>
> a. Disregard of or refusal to comply with Corporate and/or facility policies, practices, proper orders and instructions from duly authorized supervisory employees.

On October 13, 1998, the arbitrator heard testimony and accepted evidence concerning the employment dispute. On December 11, 1998, the arbitrator issued an opinion and award, finding that "Grievants shall be returned to work with all rights of seniority and benefits" and that "Grievants shall receive compensation for the period January 3, 1998, to March 2, 1998. They shall not receive compensation of any kind for the period March 2, 1998, until reinstatement to employment."[3]

In support of his judgment, the arbitrator found that the Agreement classified employees as either full-time or part-time employees.[4] While there is a provision governing mandatory overtime for full-time employees,[5] no provision is

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[3] The arbitrator found that the Grievants were offered the opportunity to return to work and refused, thereby failing to mitigate damages. The arbitrator therefore limited the amount of backpay to which the Grievants were entitled.

[4] Article XLVII of the Agreement ("Part-Time Employees") provides:

> The term "regularly employed part-time Employee" refers to persons who regularly work a number of hours and days a week which are less than the customary full forty (40) hour work week. Such persons shall be considered as regular, part-time Employees and shall customarily work on a regular part-time scheduled basis. All such employees shall enjoy proportionate holiday, vacation and sick leave benefits based upon the actual number of straight time hours worked per pay period.

[5] Article XV of the Agreement ("Hours of Work and Work Week") provides:

> Section A. The basic work day for all Employees under this Article shall be eight (8) hours per day. The basic work week for said Employees shall be forty (40) hours per week. The work week shall begin with the first shift on Monday, which is sometimes referred to as the "C" shift.
>
> Section B. Hours worked in excess of the basic work day (8 hours) or the basic work week (40 hours) shall be paid at the rate of time and one-half the regular straight time rate. Overtime payments, payable under the foregoing overtime policies, shall not be

made for mandatory overtime for part-time employees. This omission was significant. The arbitrator concluded, "I have examined the Collective Bargaining Agreement thoroughly. I find no Contract provision which permits the employer to arbitrarily require 'overtime' work by regular part-time employees in addition to their regularly scheduled hours of work."

ARH filed a complaint in the Eastern District of Kentucky on February 4, 1999, alleging that the arbitrator "ignor[ed] express, unambiguous provisions of the Agreement retaining to ARH all management rights to 'direct[] the work force'[6]

> pyramided. Overtime payments for the week shall be made under whichever policy allows the greater amount of such pay.
>
> . . .
>
> Section D. Employees shall be expected to work overtime when requested, however, the Hospital shall endeavor, insofar as may be practicable, to make an equitable distribution of overtime among the qualified Employees within a job classification. An Employee will not be disciplined for refusing to work overtime who has good and sufficient cause for so refusing to work overtime.
>
> Section E. The provisions of this Article are intended only to provide a basis for determining the number of hours of work for which an Employee shall be entitled to be paid at overtime rates and shall not be construed as a guarantee to such Employee of any specified number of hours of work either per day or per pay period or as limiting the right of the Hospital to fix the number of hours of work, including overtime, either per day or per pay period, for such Employee.

[6] Section A of Article XLII of the Agreement ("Management Rights") provides:

> Management of the Hospital includes the rights among others of hiring, discharging, and directing the working force, and of establishing reasonable policies in connection therewith, and all management rights are vested exclusively in the Hospital and shall not be abridged by the Union. However, these prerogatives shall not be used to discriminate against any member of the Union and

and 'fix the number of hours of work'[7] [.]" On November 2, 1999, on motion for summary judgment by ARH, the lower court held that "[a] collective bargaining agreement need not lay out specific guidelines that indicate what an employer is 'permitted' to do by contract to manage its business or direct its workforce; rather, it is free to manage except as specifically prohibited by a collective bargaining agreement." It then vacated the arbitral award. The Union timely appealed on November 24, 1999.

We review the district court's decision to award summary judgment to ARH *de novo*. *See Electrical Workers Local 58 Pension Trust Fund v. Gary's Elec. Service Co.*, 227 F.3d 646 (6th Cir. 2000). No dispute as to a material fact exists.

Review of an arbitrator's award is necessarily limited. A reviewing court will not replace an arbitrator's construction of the Agreement with its own interpretation. "The Supreme Court has made clear . . . that courts must accord an arbitrator's decision substantial deference because it is the arbitrator's construction of the agreement, not the court's construction, to which the parties have agreed." *Beacon Journal Publishing Co. v. Akron Newspaper Guild, Local 7*, 114 F.3d 596, 599 (6th Cir. 1997). But the arbitrator's construction must "draw[] its essence from the collective bargaining agreement" rather than serve the arbitrator's "own brand of industrial justice." *United Steelworkers of Am. v. Enterprise Wheel & Car Co.*, 363 U.S. 593, 597 (1960).

This court has vacated arbitral awards in four types of cases:

> (1) an award conflicts with express terms of the collective bargaining agreement, *see, e.g., Grand Rapids Die Casting Corp. v. Local Union No. 159, U.A.W.*, 684 F.2d 413 (6th Cir.1982);

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any policy shall not abridge any term, provisions or condition of this contract.

[7] *See* note 4 *supra* (Article XV, Section E).

(2) an award imposes additional requirements that are not expressly provided in the agreement, *see, e.g., Sears, Roebuck & Co. v. Teamsters Local Union No. 243*, 683 F.2d 154 (6th Cir.1982), *cert. denied*, 460 U.S. 1023, 103 S.Ct. 1274, 75 L.Ed.2d 495 (1983);

(3) an award is without rational support or cannot be rationally derived from the terms of the agreement, *see, e.g., Timken Co. v. United Steelworkers of America*, 482 F.2d 1012 (6th Cir.1973); and

(4) an award is based on general considerations of fairness and equity instead of the precise terms of the agreement, *see, e.g., Local 342, United Auto Workers v. T.R.W., Inc.*, 402 F.2d 727 (6th Cir.1968), *cert. denied*, 395 U.S. 910, 89 S.Ct. 1742, 23 L.Ed.2d 223 (1969).

See Cement Divs., Nat. Gypsum Co. v. United Steelworkers of Am., et al., 793 F.2d 759, 766 (6th Cir. 1986). In addition, Article XXXIII, § K of the Agreement specifically provides that an arbitrator "shall have no power to add to, subtract from, or modify in any way, any terms of the Agreement, nor shall he exercise any responsibility or function of the Hospital."

In the instant case, as observed by the district court, the arbitrator's decision conflicts with express provisions in the Agreement and imposes requirements on ARH which do not flow from the Agreement itself. The Agreement explicitly reserves to management the power to direct the work force and fix the number of hours of work to the management.[8]

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[8] The Union argues that these provisions do not specifically permit ARH to require part-time employees to work beyond their regularly scheduled shifts. First, this argument ignores the express requirement in Article XV, which allows ARH to fix the number of hours its employees work overtime. Second, insofar as Article XV does not accord ARH the relevant authority, the management rights to direct its workforce and fix the number of hours are particular enough to support ARH's orders to work overtime.

Moreover, in Article XV, the Agreement expressly provides that "[e]mployees shall be expected to work overtime when requested [unless good cause is shown]."

The Union argues that Article XV does not apply to part-time workers as Section A of the article indicates that "[t]he basic work day for *all Employees under this Article* shall be eight (8) hours per day. The basic work week for said Employees shall be forty (40) hours per week." Agreement, Article XV, Section A (emphasis added). The Union contends that part-time workers have a reduced work schedule so this article must not apply to them. The Union's contention is unavailing. Section E of Article XV indicates that "[t]he provisions of this Article are intended only to provide a basis for determining the number of hours of work for which an Employee shall be entitled to be paid at overtime rates and shall not be construed as a guarantee to such Employee of any specified number of hours of work either per day or per pay period or as limiting the right of the Hospital to fix the number of hours of work, including overtime, either per day or per pay period, for such Employee." Read in the light of Section E, Section A's "all Employees *under* this Article" (emphasis added) does not restrict the universe of employees which are subject to its requirements, but rather limits the effect of those requirements to determining overtime pay. The arbitrator was therefore wrong to conclude that there was no provision permitting ARH to direct its part-time workers to work overtime.[9] The arbitrator's construction of the Agreement

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[9] Relevant in this regard is Article XLVII which classifies part-time employees. It indicates that "part-time Employees . . . shall *customarily* work on a regular part-time scheduled basis." (emphasis added). This phrasing highlights the management's right to expand on the normal workshift for part-time employees.

conflicts with express provisions and therefore fails to draw its essence from the Agreement.[10]

Nevertheless, even if we were to credit the arbitrator's construction of the Agreement as against its conflict with express provisions, we would still have to vacate the award as it imports notions not found in the Agreement itself. The arbitrator makes this error clear in his opinion accompanying the judgment:

> I find no Contract provision which *permits* the Employer to arbitrarily require "overtime" work by regular part-time employees in addition to their regularly scheduled hours of work. Article XV, Section B, only mandates "overtime" work when employees are requested to work in excess of eight hours per day. There is no provision *permitting* the Employer to require an employee to work more than their regularly scheduled part-time hours. Article XLII only permits the Employer to direct the working force and of establishing reasonable policies in connection therewith. These prerogatives shall not abridge any term, provision, or condition of this Contract.

Arbitral Award, slip op. at 7 (emphasis added). The Agreement need not include provisions permitting management action on every conceivable employment matter; rather, on issues not discussed in the Agreement, management retains discretion. *See United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) ("Collective bargaining

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[10] The Union argues that the Agreement gave the arbitrator the power to "modify the penalty" in discharge cases. Agreement, Article XXXII, § C ("In the event a grievance or discharge goes to arbitration, the arbitrator shall have the authority to modify the penalty[.]"). The Union asserts that the arbitrator merely modified the employment termination. However, even a cursory review of the arbitrator's opinion demonstrates that the arbitrator determined that ARH was without authority to discipline the Grievants-the Union's post hoc contention notwithstanding.

agreements regulate or restrict the exercise of management functions; they do not oust management from the performance of them. Management hires and fires, pays and promotes, supervises and plans. All these are part of its function, and absent a collective bargaining agreement, it may be exercised freely except as limited by public law and by the willingness of employees to work under the particular, unilaterally imposed conditions.").[11] The arbitrator created a limitation on ARH's management rights that is not found in the Agreement.[12] In so doing, the arbitrator's decision failed to draw its essence from the Agreement.[13]

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[11] The Union cites to a different passage in *Warrior & Gulf*, contending that the case eviscerated the doctrine that management rights were paramount when not specifically abrogated by the collective bargaining agreement:

> The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it. The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished.

Warrior & Gulf, 363 U.S. at 581-82. This passage does not bear the weight of the Union's argument. As quoted in the text accompanying this footnote, which immediately follows the above-quoted passage, the *Warrior & Gulf* Court did not abrogate management rights. In addition, the past practices of ARH and industry behavior did not inform the arbitrator in his resolution of the issue and the Union did not submit any evidence to this court of past practices or industry behavior to support its claims.

[12] "When a collective bargaining agreement prohibits the addition of contract terms, the arbitrator may not proceed to do so." *International*

For the foregoing reasons, the lower court's award of summary judgment is AFFIRMED.

DISSENT

RONALD LEE GILMAN, Circuit Judge, dissenting. I fully agree with the majority's articulation of the proper standard for reviewing the arbitrator's award, i.e., that "[a] reviewing court will not replace an arbitrator's construction of the Agreement with its own interpretation." Slip Op. at 6. Unfortunately, however, I am convinced that this is precisely what the majority has done.

The majority purports to vacate the arbitrator's award on two grounds: (1) that the award conflicts with the express terms of the collective bargaining agreement (CBA), and (2) that the award imposes additional requirements that are not expressly provided for in the agreement. To the contrary, I am of the opinion that the award is in full accord with the CBA and based on a reasonable interpretation of its express terms. I would therefore reverse the ruling of the district court and reinstate the arbitrator's award.

In determining that the award conflicts with the express terms of the CBA, the majority finds that the agreement recognizes the hospital's right to require overtime of all its employees and to fix the number of hours in the work week. Article XV of the CBA, however, upon which the majority

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Brotherhood of Electrical Workers v. Thomas & Betts Corp., 182 F.3d 469, 472 (6th Cir. 1999). The Agreement expressly prohibits the arbitrator from "add[ing] to, subtract[ing] from, or modify[ing] in any way, any terms of the Agreement[.]" Agreement, Article XXXIII, § K.

[13] ARH contends that the arbitrator's decision was in contravention of Kentucky public policy. As we vacate the decision on other grounds, we do not reach this issue.

relies, is ambiguous as to whether it applies to all employees or only to full-time employees. The key terms of Article XV provide as follows:

> Section A. The basic work day for all Employees *under this Article* shall be eight (8) hours per day. The basic work week for said Employees shall be forty (40) hours per week. . . .
>
> Section D. Employees shall be expected to work overtime when requested, however, the Hospital shall endeavor, insofar as may be practicable, to make an equitable distribution of overtime among the qualified Employees within a job classification. An Employee will not be disciplined for refusing to work overtime who has good and sufficient cause for so refusing to work overtime.

(Emphasis added.)

Although Section D of Article XV *could be* interpreted as allowing the hospital to require overtime work for all of its employees, both full-time and part-time, I believe that the more reasonable interpretation (and the one adopted by the arbitrator) is that Section D applies only to full-time employees covered by Article XV. There is, after all, a separate Article XLVII governing part-time employees. Article XLVII is comprised of four sections covering such topics as scheduling, job benefits, and ability to post for vacancies, none of which mention overtime work.

Such ambiguity, I believe, requires this court to uphold the arbitrator's award. When examining an arbitration award under facts "not explicitly covered" by an agreement, a court may disagree with the arbitrator's interpretation, but may not reject the interpretation so long as it is "one of several rational interpretations." *Dallas & Mavis Forwarding Co. v. Gen. Drivers, Warehousemen & Helpers, Local Union No. 89*, 972 F.2d 129, 135 (6th Cir. 1992) (upholding an

arbitrator's determination that the employer violated the CBA by refusing to merge its seniority list with that of another employer, even though other interpretations were possible). In the present case, the arbitrator's remedy of reinstating the employees does not appear to conflict with any provision of the CBA.

Article XXXII of the CBA, in fact, explicitly provides that "[i]n the event a grievance concerning suspension or discharge goes to arbitration, the arbitrator shall have the authority to modify the penalty, and the Hospital and the Union agree to in all respects comply with the award of the Arbitrator." That is exactly what the arbitrator did in the present case, and the hospital should be bound to accept the result. I would therefore defer to the determination of the arbitrator that the hospital's authority to compel overtime work applies only to full-time employees. *See Int'l Ass'n of Machinists & Aerospace Workers v. Tenn. Valley Auth.*, 155 F.3d 767 (6th Cir. 1998) (upholding an arbitrator's order requiring the Tennessee Valley Authority to create a bargaining unit for hourly employees, despite an existing agreement allowing outsourcing that arguably applied to these employees).

The majority also holds, in my view erroneously, that the arbitrator's order to reinstate the three employees impermissibly restricts the management rights of the hospital in a manner not expressly provided for by the agreement. *See* Slip Op. at 10-11. This case, however, involves an issue upon which the Agreement has spoken. Article XLII of the CBA provides as follows:

> [T]he rights, among others, of hiring, discharging, and directing the working force, and of establishing reasonable policies in connection therewith, and all management rights are vested exclusively in the Hospital. However, these prerogatives shall not be used to discriminate against any member of the Union and

> any policy *shall not abridge any term, provisions or condition of this contract.*

(Emphasis added.) The terms of the contract itself, therefore, limit the hospital's management rights to those that are in accordance with the other articles of the agreement.

Consequently, the arbitrator did not impose any additional requirements not expressly provided for in the agreement. The arbitrator, in fact, clearly acknowledged that he could not add to, subtract from, or modify the agreement. Rather, he examined the other articles of the agreement to determine that the CBA did not grant the hospital the right to compel its part-time employees to work overtime. The arbitrator reached this conclusion by interpreting Article XV as providing the hospital with the authority to request only full-time employees, and not part-time employees, to perform overtime work. Because I believe that the arbitrator had a sound basis for this conclusion, the hospital did not have the "just cause" necessary to terminate Adkins, Mahon, and Thomas under Article XXXII, Section A, of the CBA (governing discharge).

Indeed, additional articles of the CBA establish that the hospital does not have the unfettered right to hire or fire its employees. Article X, Section D, for example, provides the bases for awarding various jobs to applicants depending on the grade of the employment openings. Similarly, Article XXXII restricts the hospital from preemptorily discharging its workers, and instead requires an initial suspension pending a hearing. In light of these articles, the arbitrator reasonably interpreted Articles XV and XLVII as circumscribing the termination rights available to the hospital under Article XXXII.

The majority's opinion, therefore, impermissibly replaces the arbitrator's construction of the Agreement with its own interpretation. *See Beacon Journal Publ'g Co. v. Akron Newspaper Guild, Local Number 7*, 114 F.3d 596, 599 (6th

Cir. 1997). Here, the arbitrator recognized that Article XLII gave the hospital the general authority to direct its workforce. But he interpreted this authority as not including the right to terminate part-time workers for refusing to perform unscheduled overtime work. Because the arbitration award was based on a reasonable interpretation of ambiguous contractual provisions, we are required to defer to the determination of the arbitrator. *See United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960) (stating that "[i]t is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.").

For all of the reasons set forth above, I would reverse the decision of the district court and reinstate the award of the arbitrator.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

[Filed Nov 02, 1999]

Civil Action No. 99-7

APPALACHIAN REGIONAL HEALTHCARE, INC.,
Plaintiff,

v.

UNITED STEELWORKERS OF AMERICA, AFK-CIO-CLC,
and LOCAL 14398,
Defendants.

MEMORANDUM OPINION AND ORDER

Before the Court is the motion of the plaintiff, Appalachian Regional Healthcare, Inc. ("Appalachian"), for summary judgment pursuant to Fed. R. Civ. P. 56 (b) [Record No.9]. The Defendants have filed a response [Record No. 12] to which the Plaintiff has replied [Record No. 14]. In addition, Defendant, United Steelworkers of America, has filed a motion for summary judgment [Record No. 11] to which the Plaintiff has responded (Record No. 14]. The time for reply has lapsed. The Court Being sufficiently advised, this matter is ripe for review.

FACTUAL BACKGROUND

Three employees were discharged from Appalachian for insubordination and violation of Appalachian's Code of Ethics after the employees repeatedly walked off the job when told to work overtime. The defendants, the United Steel Workers of America, AFL-CIO-CLC, and its Local 14398,

represented the three employees during arbitration. The arbitration award ordered the reinstatement of the three discharged employees. However, because the award clearly failed to draw its essence from the collective bargaining agreement, it must be vacated.

DISCUSSION

Article XXXIII, Section K of the collective bargaining agreement between Appalachian and its employees states that any arbitrator selected by the parties to hear a grievance "shall have no power to add to, subtract from, or modify in any way, any terms of the Agreement, nor shall he exercise any responsibility or function of the Hospital."

Additionally, in Article XLII the collective bargaining agreement gives the hospital management rights including the powers of "hiring, discharging, and directing the working force, and of establishing reasonable policies in connection therewith, and all management rights are vested exclusively in the Hospital." Section E of Article XV of this agreement gives Appalachian the power to

> "provide a basis for determining the number of hours of work for which an employee shall be entitled to be paid at overtime rates and shall not be construed as a guarantee to such employee of any specific number of hours of work either per day or per pay period or as limiting the right of the Hospital to fix the number of hours of work, including overtime, either per day or per pay period, for such employee."

The collective bargaining agreement clearly establishes Appalachian's right to require employees to work overtime. This insures that patients are not put at risk when a particular shift is understaffed. The rights to management of employee's work schedules is unambiguously vested in Appalachian under this agreement. The arbitrator's decision to reinstate the discharged employees, after Appalachian exercised its rights under the agreement, must be reversed.

Case law establishes that, when an arbitrator's award fails to "draw [] its essence from the collective bargaining agreement", the award must be vacated. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596-97 (1960). In the case at bar, "the arbitrator is confined to the interpretation and application of the collective bargaining agreement, and although he may construe ambiguous contract language, he is without authority to disregard or modify plain and unambiguous provisions." *Dobbs, Inc. v. Local 614, Internat'l Bhd of Teamsters*, 813 F.2d 85, 86 (6th Cir. 1987) (citations omitted).

A collective bargaining agreement need not lay out specific guidelines that indicate what an employer is "permitted" to do by contract to manage its business or direct its workforce; rather, it is free to manage except as specifically prohibited by a collective bargaining agreement. *United Steelworkers v. Warrior & Gulf navigation Co.*, 363 U. S .574, 583 (1960). Case law, and the collective bargaining agreement itself, clearly indicate that Appalachian was within its rights to discharge breaching employees. The plaintiff should not be subject to an arbitrator's award altering the collective bargaining agreement. Therefore, pursuant to 29 U.S.C. § 185, the arbitrator's award will be vacated and Appalachian is no longer required to reinstate the discharged employees in this matter.

Accordingly, IT IS ORDERED

(1) That the plaintiff's motion for summary judgment be, and the same hereby is, GRANTED;

(2) That the arbitrator's decision challenged herein be, and the same hereby is, VACATED.

This the 2nd day of November, 1999.

/s/ Joseph M. Hood
JOSEPH M. HOOD, Judge

Date of Entry and Service:

APPENDIX C

ARBITRATION OPINION AND AWARD

Grievance No. 98-14398-2

In the Matter of Arbitration Between:

APPALACHIAN REGIONAL HEALTHCARE, INC.,

and

UNITED STEELWORKERS OF AMERICA AFL-CIO-CLC

Grievance of:
Chris Adkins
Steven Mahon
Lamar Thomas

* * * *

APPEARANCES:

For the Employer — David J. Lang
Vice President and Chief
Employee Support Officer
Appalachian Regional Healthcare
1220 Harrodsburg Road
P.O. Box 8086
Lexington, Kentucky 40533

For the Union: — Carlton R. "Carl" Hall
Staff Representative
Sub District Office
United Steelworkers of America
205 E. Reynolds Road—Suite E
Lexington, Kentucky 40517

ARBITRATOR: W. Scott Thomson, P.O. Box 22268, Louisville, Kentucky 40252-0268.

By the terms of the Agreement between Appalachian Regional Healthcare, Inc., hereinafter called "the Employer," and United Steelworkers of America, AFL-CIO-CLC, hereinafter referred to as "the Union," disputes between the parties are to be settled in accord with the grievance and arbitration procedure therein provided. Pursuant to such procedure W. Scott Thomson was selected by the parties by mutual choice as arbitrator to hear a matter concerning discharge. A Hearing was held October 13, 1998, at the Appalachian Regional Hospital, South Williamson, Kentucky, in which full and equal opportunity was afforded the parties to make statements and argument, introduce evidence, and examine and cross-examine witnesses. Post-Hearing Briefs were submitted.

CONTRACT PROVISIONS

Joint Exhibit #1.

ARTICLE XV
HOURS OF WORK AND WORK WEEK

. . . .

Section D. Employees shall be expected to work overtime when requested, however, the Hospital shall endeavor, insofar as may be practicable, to make an equitable distribution of overtime among the qualified Employees within a job classification. An Employee will not be disciplined for refusing to work overtime who has good and sufficient cause for so refusing to work overtime.

ARTICLE XLIV
SCOPE OF AGREEMENT

. . . .

Section D. No policy established by the Hospital in connection with the exercise of its managements rights shall abridge any terms, provisions or conditions of this Agreement insofar as this Agreement regulates rates of pay, hours of work and conditions of employment.

ARTICLE XLV
SEVERABILITY

Should any Article of this Agreement or any Section or Provision hereof violate any applicable law, such Article or Section or Provision hereof shall be inoperative to the extent that it is at variance with such law. All Agreement shall not be affected and shall remain in full force and effect. The parties shall meet forthwith to renegotiate any such inoperative Article or Section or provision hereof to comply with the law.

Joint Exhibit #2.

I. CODE OF ETHICS

. . . .

3 Violations of The Code of Ethics:

The following acts are considered appropriate reasons for disciplinary action, however, these acts are obviously not all the reasons the Corporation may deem cause for disciplinary action.

a. Disregard of or refusal to comply with Corporate and/or facility policies, practices, proper orders and instructions from duly authorized supervisory employees.

ISSUE

Whether the Employer had just cause to discharge Grievants?

OPINION

December 30, 1997, Grievants were scheduled to work 4:30 p.m. to 8:30 p.m. This was their regular assigned shift of work. They were regular part-time employees who customarily worked on a regular part-time scheduled basis. Larry Tackett was their foreman. Shortly before 8:20 p.m., Tackett instructed Grievants they were to work overtime and to "stay

on their machines." Additional "overtime" work was required. Similar instructions were issued to eleven other employees.

At the end of their regular shift (8:30 p.m.), Grievants left their work area. Tackett inquired where they were "going." An argument ensued with Grievants' questioning Tackett's authority to request they work "overtime," work past their scheduled hours. After a few moments Tackett instructed the Grievants to simply "go on." Grievants then left the laundry area. They did not return.

The next day Grievants' received a Written Record of Verbal Warning. They were charged with a violation of the "Code of Ethics." They were charged with leaving their work area having been instructed to remain at work. No grievance was filed.

January 2, 1998, Grievants were again scheduled to work four hours, 4:30 p.m. to 8:30 p.m. Tim Adkins was their immediate supervisor on this occasion. Adkins determined that additional work was required. He instructed Grievants to remain at their work place for additional work. They were offered the option of going on meal break at 8:30 p.m., or simply take a fifteen minute "rest." They chose the latter. All other employees were requested to work additional time.

After a break, Adkins returned to his office where the Grievants were then located. They informed Adkins they had paged their Union representative and were awaiting his arrival. Grievants again were directed to work. The Union representative did not arrive at the laundry area until 9:15 p.m. Between 8:30 p.m. and 9:15 p.m. Grievants performed no work. The Union Representative inquired of Adkins whether Grievants could go home. Adkins responded affirmatively. Grievants were notified of their suspension by letter dated January 5, 1998. January 8, 1998, their suspension was converted to discharge. The offense cited was

insubordination in violation of the Code of Ethics. Grievants did not offer a reason why they could not stay past 8:30 p.m.

The Union proffers that no direct order to work was issued to Grievants. This is inapposite with established facts. A direct order to continue work was issued on both occasions. However, they were to be paid at the straight time rate of compensation.

Article XLVII, Section A, defines a regular part-time employee. It refers to persons who regularly work a number of hours and days a week which are less than the customary full forty (40) hour workweek. Such persons shall be considered as regular part-time employees and shall work a regular part-time scheduled basis. As a regular part-time employee they are entitled to proportionate holiday, vacation, and sick leave benefits based upon the actual number of straight time hours worked per pay period.

The Collective Bargaining Agreement in Article XIV, Section D, permits the Employer to reduce an employee's hours whenever economic or other business related reasons dictate. This is not to constitute a layoff. A reduction of hours may include an individual employee or group of employees. This is consistent with Article XV which provides that the basic workday for all employees under this Article shall be eight hours per day. The basic workweek for employees shall be forty (40) hours per week. Thus, the Contract provides for two types employees, (1) regular full time employees, and (2) regular part-time employees.

Section B. Hours worked in excess of the basic work day (8 hours) or the basic workweek (40 hours) shall be paid at the rate of time and one-half the regular straight time rate. "Overtime" payments for the week shall be made under whichever policy allows the greater amount of such pay.

Section D. Employees shall be expected to work "overtime" when requested. However, the hospital shall

endeavor, insofar as may be practicable, to make an equitable distribution of overtime among qualified employees within a job classification. An employee will not be disciplined for refusing to work "overtime" who has good and sufficient cause for refusing to work overtime. This shall not be construed as a guarantee to such employee of any specific number of hours of work either per day or per pay period or as limiting the right of the hospital to fix the number of hours of work, including "overtime," either per day or per pay period, for an employee.

I have examined the Collective Bargaining Agreement thoroughly. I find no Contract provision which permits the Employer to arbitrarily require "overtime" work by regular part-time employees in addition to their regularly scheduled hours of work. Article XV, Section B, only mandates "overtime" work when employees are requested to work in excess of eight hours per day. There is no provision permitting the Employer to require an employee to work more than their regular scheduled part-time hours. Article XLII only permits the Employer to direct the working force and of establishing reasonable policies in connection therewith. These prerogatives shall not abridge any term, provision, or condition of this Contract. It must be emphasized that the Arbitrator shall have no power to add to, subtract from, or modify in anyway, any terms of this Agreement.

There is no doubt, however, that Grievants, in part, contributed to this matter. Article XXXIII, Section B, provides: In the event of a grievance there shall be no work stoppages or strikes. An employee having a grievance (or the Union) shall take it up with his immediate supervisor specifying that the matter is a formal grievance. It is clear that Grievants did not adhere to the age old policy of "continuing work and then grieve." Commencing on page 1 of the Collective Bargaining Agreement it states that it is the intent

and purpose of the parties that this Agreement shall set forth the agreements of the parties hereto in respect to rates of pay, hours of work, and conditions of employment to be observed by ARH, the Union and employees. It is to provide procedures for the equitable adjustment of grievances to prevent . . . interruption of work, work stoppages, . . . or other interferences with the work of the healthcare entities during the life of the Agreement, and to promote harmonious relations between ARH, its employees and the Union. They are to encourage the highest possible degree of friendly, cooperative relationship between all employees. This goal depends primarily on attitudes between people in their respective organizations and at all levels of responsibilities. Proper attitude must be based on full understanding of and regard for the respective rights and responsibilities of both ARH and the Union. This demands fairness and understanding.

Grievants were offered the opportunity to return to work March 2, 1998, and, again April 1, 1998. They chose not to return to work. Thus, Grievants are not entitled to compensation except for the period commencing January 3, 1998, until March 2, 1998.

AWARD

1. Grievants shall be returned to work with all rights of seniority and benefits.

2. Grievants shall receive compensation for the period January 3, 1998, to March 2, 1998. They shall not receive compensation of any kind for the period March 2, 1998, until reinstatement to employment.

/s/ W. Scott Thomson
W. SCOTT THOMSON
Arbitrator.

Date: December 11, 1998

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed May 10, 2001]

No. 99-6590

APPALACHIAN REGIONAL HEALTHCARE, INC.,
Plaintiff-Appellee,

v.

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC, LOCAL 14398, *et al.*,
Defendants-Appellants.

ORDER

BEFORE: KRUPANSKY, BATCHELDER, AND GILMAN,
Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Gilman would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN, Clerk

APPENDIX E

AGREEMENT

THIS AGREEMENT, made and entered into by and between APPALACHIAN REGIONAL HOSPITALS, INC., with offices at 1220 Harrodsburg Road, Lexington, Kentucky 40533, and its successors, hereinafter designated as the "Hospital," and the UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, with its offices at 5 Gateway Center, Pittsburgh, Pennsylvania 15222, and its successors, hereinafter referred to as the "Union" . . . ."

ARTICLE III

RECOGNITION OF THE UNION

Section A. The Hospital voluntarily recognizes the Union as the sole and exclusive collective bargaining representative for the Employees, as hereinafter defined, of the Hospital at its 11 regional hospitals . . . ."

Section B. The bargaining unit includes only the full-time and regularly employed part-time maintenance, service, LPN, clerical, and technical employees including those at the locations listed in Section A, and those listed in Appendix A and shall specifically exclude, among others, the following . . . ."

ARTICLE XV

HOURS OF WORK AND WORK WEEK

Section A. The basic work day for all Employees under this Article shall be eight (8) hours per day. The basic work week for said Employees shall be forty (40) hours per week. The work week shall begin with the first shift on Monday, which is sometimes referred to as the "C" shift.

Section B. Hours worked in excess of the basic work day (8 hours) or the basic work week (40 hours) shall be paid at the rate of time and one-half the regular straight time rate.

Overtime payments, payable under the foregoing overtime policies, shall not be pyramided. Overtime payments for the week shall be made under whichever policy allows the greater amount of such pay.

. . . .

Section D. Employees shall be expected to work overtime when requested, however, the Hospital shall endeavor, insofar as may be practicable, to make an equitable distribution of overtime among the qualified Employees within a job classification. An Employee will not be disciplined for refusing to work overtime who has good and sufficient cause for so refusing to work overtime.

Section E. The provisions of this Article are intended only to provide a basis for determining the number of hours of work for which an Employee shall be entitled to be paid at overtime rates and shall not be construed as a guarantee to such Employee of any specified number of hours of work either per day or per pay period or as limiting the right of the Hospital to fix the number of hours of work, including overtime, either per day or per pay period, for such Employee.

. . . .

ARTICLE XXXII

SUSPENSION AND DISCHARGE CASES

. . . .

Section C. In the event a grievance concerning suspension or discharge goes to arbitration, the arbitrator shall have the authority to modify the penalty, and the Hospital and the Union agree to in all respects comply with the award of the Arbitrator.

ARTICLE XXXIII

GRIEVANCE AND ARBITRATION PROCEDURE

Section A. A grievance is defined as a dispute or complaint concerning the interpretation, application or compliance with, any provision of this Agreement, arising out of this Agreement between the Hospital and the Union, or Employee.

Section B. In the event of a grievance, there shall be no work stoppages or strikes, and the following procedures shall be observed to resolve a grievance:

. . . .

Section G. If the grievance is not settled in Step 4, and if written demand is made by the Union, then within ten (10) working days after written demand for arbitration, an arbitrator will be selected from a permanent panel of ten (10) arbitrators mutually agreed to by the Hospital and the Union. . . .

. . . .

Section J. The award of the arbitrator shall be final, conclusive and binding upon the Hospital, the Union, and the Employee(s).

Section K. The arbitrator shall have jurisdiction only over disputes or complaints involving the interpretation or application of, or compliance with, the terms of this agreement, and he shall have no power to add to, subtract from, or modify in any way, any terms of the Agreement, nor shall he exercise any responsibility or function of the Hospital or the Union, nor shall he have jurisdiction over any dispute or complaint involving any practice of the Hospital unless it is contended that such practice abridges a provision of the Agreement. The parties to this Agreement shall make a sincere effort to resolve any complaint or problem even though it does not involve the interpretation, application or compliance with the provisions of this Agreement.

ARTICLE XLII

MANAGEMENT RIGHTS

Section A. Management of the Hospital includes the rights among others of hiring, discharging, and directing the working force, and of establishing reasonable policies in connection therewith, and all management rights are vested exclusively in the Hospital and shall not be abridged by the Union. However, these prerogatives shall not be used to discriminate against any member of the Union and any policy shall not abridge any term, provisions or condition of this contract.

ARTICLE XLVI

DURATION

This Agreement shall terminate at the expiration of ninety (90) days after either party shall give written notice of termination to the other party but in any event shall not be terminated earlier than April 1, 1998 at 12:01 a.m. If either party gives such notice, the parties shall meet within thirty (30) days thereafter to negotiate.

ARTICLE XLVII

PART TIME EMPLOYEES

Section A.

The term "regularly employed part-time Employee" refers to persons who regularly work a number of hours and days a week which are less than the customary full forty (40) hour work week. Such persons shall be considered as regular, part-time Employees and shall customarily work on a regular part-time scheduled basis. All such employees shall enjoy proportionate holiday, vacation and sick leave benefits based upon the actual number of straight time hours worked per pay period.

Section B.

Part-Time employees hired after April 1, 1986 will share in the cost of medical benefits insurance premiums. The proportionate amount paid by the Hospital will be based upon the actual number of straight time hours worked, adjusted on a quarterly basis.

Section C.

Experience gained by part-time employees in their part-time positions cannot be used to qualify them for posted job vacancies over full-time bidders for the position.

Section D.

Full-time employees who are displaced to part-time status shall be allocated Additional Vacation Pay at the full-time rate.